CANADIAN RAILWAY OFFICE OF ARBITRATION & DISPUTE RESOLUTION

CASE NO. 5136

Heard in Montreal, February 11, 2025

Concerning

CANADIAN NATIONAL RAILWAY

And

TEAMSTERS CANADA RAIL CONFERENCE

DISPUTE:

The Company's discharge of Conductor J. Couture on June 3, 2024.

JOINT STATEMENT OF ISSUE:

On June 3, 2024, Conductor Couture was discharged for "Circumstances surrounding your sleeping or assuming the position of sleeping while on duty, in violation of General Rule A (XI) of the Canadian Rail Operating Rules and GOI 8 - safe work procedures during your Assignment L50231-28 on April 28, 2024" The Company also assessed him 35 demerits for "Circumstances surrounding your alleged MTAV – occupied the main track without authority at mile 16.55 Hagersville sub while working on the L50231-28 on April 28th, 2024" and 30 demerits for "Circumstances surrounding your sleeping or assuming the position of sleeping while on duty, in violation of General Rule A (XI) of the Canadian Rail Operating Rules and GOI 8 - safe work procedures during your Assignment L50231- 28 on April 28, 2024", for an incident that arose out of his April 28, 2024, tour of duty on train L502

Union's Position:

It is the Union's position, however not limited hereto, that the Company's actions are contrary Article(s) 82, 85, 85.5, Addendum 123 and 124 of Collective Agreement 4.16, Arbitral Jurisprudence when Conductor Couture was assessed a total of 65 demerits and discharged for a single tour of duty on April 28, 2024.

The Union contends that the discipline assessed was indeed excessive, unwarranted, unjustified and in bad faith.

The Union argues that the Company following the alleged main track authority violation on the part of Conductor Couture, the Company went on a fishing expedition to review the LVVR footage of the tour of duty in violation of the regulations, allegedly finding footage of Conductor Couture sleeping, something he has denied from the outset. The Union further argues that the investigation, which occurred on May 23, 2024, was in violation of Article 82.6 as it was 25 days after the alleged incident took place.

The Union submits that the Company has failed to adhere to Article 82 of the 4.16 as the investigation was neither fair nor impartial nor did he receive proper notice for the investigation. It

is the Union's position that the Company withheld evidence as the Company did not make the entire audio recording available to the Union and the grievor at the formal investigation but rather an edited version of the audio recording from the night of April 28, 2024.

The Union further submits that the discipline assessed was not done so in a progressive manner as set out in the Brown System of Discipline in accordance with Addendum 124 of the 4.16 Collective Agreement. The Union contends that the discipline imposed on Conductor Couture was punitive in nature and issued in a manner to cause maximum damage to Conductor Couture and in no way progressive as is the goal of the Brown System.

The Union contends that Conductor Couture was the victim of "double jeopardy" as he was assessed two separate heads of discipline for the same offense, namely "Circumstances surrounding your sleeping or assuming the position of sleeping while on duty, in violation of General Rule A (XI) of the Canadian Rail Operating Rules and GOI 8 - safe work procedures during your Assignment L50231-28 on April 28, 2024" which he was assessed 30 demerits and a discharge as shown by the Company's two CN Form 780 issued on June 3, 2024.

It is the Union's position that the Company failed to ensure that Conductor Couture was properly familiarized with the Hagersville Subdivision and in turn failed to ensure the safety of the grievor as set out in the Canada Labour Code.

The Union argues that this was breach of Conductor Couture's substantive rights under the Collective Agreement to a fair and impartial investigation and therefore it should render the discharge void ab initio.

The Union, as a result of the violations, requests that Conductor Couture be reinstated to his employment, compensated for all lost wages and benefits, without loss of seniority. In the alternative the Union seeks to have Conductor Couture reinstated on terms that the arbitrator deems fit.

Company's Position:

The Company disagrees with the Union's position.

The Company maintains the investigations were fair and impartial. Specifically, the Company:

1) issued sufficient Notices to Appear;
2) conducted the investigations in a timely manner, in accordance with the Collective Agreement;
3) asked the grievor appropriate questions;
4) disclosed evidence to the Union;
5) did not violate the grievor's rights under PIPEDA; and
6) did not violate the LVVR Regulations.

The Company requests a cease and desist as the Union caused unnecessary disruptive tactics and delays to the investigation.

Furthermore, considering (1) the gravity of a Main track authority violation, (2) the grievor's disciplinary history, (3) the grievor's short service and (4) the grievor's lack of forthcomingness during the investigation, 35 demerits was appropriate.

Considering (1) the very serious nature of the infraction of sleeping or assuming the position of sleeping while operating moving equipment, (2) the grievor's disciplinary history, (3) the grievor's short service, (4) the grievor's attempts to evade responsibility and (5) the absence of mitigating factors, 30 demerits was appropriate.

The Company submits that the Union's allegations that the issuance of 30 demerits to the grievor and his subsequent discharge for accumulation of demerits constitute double jeopardy are without merit and denies the allegation that the Company failed to adhere to the Brown System of Discipline. The grievor was issued 30 demerits for sleeping or assuming the position of sleeping while on duty, which was reasonable in the circumstances. This resulted in the grievor accumulating over 60 demerits and being discharged for an accumulation of demerits.

The Company further submits that the Main track authority violation and the infraction of sleeping or assuming the position of sleeping while operating moving equipment are two distinct violations, each warranting separate consequences.

For the Union:
(SGD.) J. Lennie
General Chairperson

For the Company:
(SGD.) T. Sadhoo
Manager Labour Relations

There appeared on behalf of the Company:

J. Deschamps	– Counsel, Montreal
F. Daigneault	– Director Labour Relations, Montreal
I. Perkins	– Senior Manager Investigations, Montreal
T. Sadhoo	– Manager Labour Relations, Toronto via zoom
S. Matthews	– Senior Manager Labour Relations, Toronto via zoom

And on behalf of the Union:

K. Stuebing	– Counsel, Caley Wray, Toronto
J. Lennie	– General Chairperson, Hamilton
J. Couture	– Grievor via zoom, Sarnia
G. Gower	– Vice General Chairperson, Hamilton
E. Page	– Vice General Chairperson, Hamilton

AWARD OF THE ARBITRATOR

Context

1. The Grievor is a Conductor with approximately two years of seniority at the time of the incident.

2. The essential facts of this matter are not contested. On April 28, 2024, he committed a Main Track Authority Violation ("MTAV") when he gave a Track Release to a Rail Traffic Controller for a portion of the track which the train was currently occupying.

3. This Track Release occurred because neither he nor the Locomotive Engineer knew the exact location of their train.

Issue

A. Was the discipline of 35 Demerits reasonable in the circumstances, or should a lesser penalty be imposed?

Position of Parties

4. The Company takes the position that Grievor has committed a very serious operating rule mistake which could have resulted in serious harm to life and/or property. It argues that the discipline is entirely appropriate.

5. It notes that the Grievor has admitted his error, and has a previous safety discipline, despite having worked for only two years. It notes further that the LE was assessed a 45 Demerit penalty for his part in the incident.

6. The Company argues that the Grievor was less than forthright in admitting his personal fault, having attempted to blame the RTC.

7. The Union argues that while an error was committed, it was largely due to a lack of familiarity with the run caused by a lack of training.

8. It submits that the error was inadvertent, and represents a stand-alone incident in the Grievor's career.

9. It further submits that the Grievor was forthright, did not in fact blame the RTC and took responsibility for his mistake.

10. It submits that a significantly lesser penalty should be applied.

Analysis and Decision

11. CROR Rule 85 provides for Track Clearances, while Rule 302.3 addresses Cancelling Clearances as follows:

> 85. TRACK RELEASE REPORTS
>
> 7) The conductor will ensure the RTC is promptly advised of the time their movement has arrived, left or cleared a location or at a time specified by the RTC or after clearing the limits of the last proceed clearance for that subdivision.
>
> 8) Prior to making such report, the conductor must confirm with other crew members the accuracy of the information to be provided.
>
> 9) When a track release report is transmitted to the RTC, the RTC must, as it is transmitted, verify the movement identification and record the location into the computer assisted system. If correct the locomotive engineer must confirm correctness of the report to the RTC.

[…]

302.3 CANCELLING CLEARANCE

10) Before a clearance is cancelled, the train or transfer addressed must be;

- clear of the limits;
- protected by Form T GBO; or
- within cautionary limits.

11) When a clearance is cancelled, the cancellation does not take effect until it has been acknowledged by the conductor and locomotive engineer. These employees must acknowledge by repeating the clearance number, “cancelled” and initials of the RTC to the RTC.

12. The Grievor described during his investigation how he gave up an incorrect Track Clearance and the crew’s efforts to correct their mistake with the RTC:

13. Q. Mr. Couture please describe in your own words the circumstances that lead to your crew allegedly releasing track that your movement was occupying on the Hagersville Sub on April 28, 2024 leading to a Main Track Authority Violation.

A. As we were passing, the bridge there was a group of foremen on both sides as they gave us a good inspection, they asked L502 to release track to Mile 12 when it was clear so I could start work. I said that I would get that done for him. As we called the RTC and were confirming to release the track Mike said hold on RTC as she hung up. We were trying to correct the mistaken mileage, by the time we contacted the RTC after multiple attempts and corrected the stated mileage, we were told to tie the train down and picked up by an Aldershot TM and driven to Brantford for a Drive Check and were subsequently pulled form service.

14.Q. Mr. Couture, according to the audio tape evidence provided your crew at 0906 reported to the RTC that you were clear of Mile 12 on the Hagersville Sub and released the track North of that mileage and repeated a completion time is this correct?

A. Yes, but we immediately were trying to correct the mistaken mileage but she disconnected.

Note: The union objects to the question asked as the audio has been edited and not time stamped, if the full audio was played then you would have heard the crew trying to contact the RTC but she had already disconnected the transmission. The audio has also not been provided.

The company notes the objection and the investigation will proceed. The audio is available if the union if would agree to the Confidentiality Agreement and additionally can be heard at their request at any time.

15.Q. Mr. Couture, according to the audio tape evidence provided your Engineer called back to report that you were at the wrong

mileage and had not reached mile 12 yet and were approaching mile 15 and made a mistake and asked to take that back is this correct?

A. Yes

Note. The union objects to the question asked as the audio has been edited and not time stamped, if the full audio was played then you would have heard the crew trying to contact the RTC but she had already disconnected the transmission. The audio has also not been provided.
The company notes the objection and the investigation will proceed. The audio is available if the union if would agree to the Confidentic88 Agreement and additionally can be heard at

13. The company summarizes the multiple errors made as follows:

Upon realizing that he had given incorrect information to the RTC, the Grievor stated that:
(a) he was at the "wrong mile", "not having hit mile 12 yet" [Tab 17];
(b) he was "right around mile 15, comin' up to mile 15" [Tab 17]. This information was also inaccurate;

(c) after the RTC instructed him to stop the train, he confirmed he was between mile 12 and mile 15, instructions to protect against Foreman Joseph Ismail [Tab 17];

(d) he then called back the RTC to state that he was at mile 16.55 (despite having just stated a moment earlier that he was "right around mile 15, comin' up to mile 15") [Tab 19];

(e) finally, he called the RTC again to explain "there was a little bit of a mix-up" and that "it wasn't even Foreman Ismail, it was Foreman [unclear]" [Tab 20].

14. Both Parties acknowledge that an error was committed by the Grievor and that some form of discipline is appropriate. They differ in terms of the severity of the error and whether the Grievor has admitted his fault or attempted to blame others. They consequently also differ with respect to the reasonableness of the discipline imposed.

15. In my view, it is clear that the Grievor did not have good situational awareness, despite the fact that the train had just passed over the major landmark on the run, the bridge over the Grand River. It is imperative that Conductors know the location of their trains at all times, as following instructions becomes otherwise impossible. I cannot agree with the Union argument that this is to be excused by a lack of training or familiarity with the area. The Grievor had been on training runs over this stretch of track, and in any event, if he was unclear as to his location, he had a duty to immediately seek assistance. (see **CROA 4794**, **CROA 4885**).

16. The fact that he did not know the precise location of his train made possible the confusion about when to give the Track Release. He clearly gave it well in advance of passing through Mile 12, and repeated his error with the RTC.

17. He also failed to identify the Track Foreman as Foreman Lemieux, assuming that it was Foreman Ismail.

18. While these errors did not result in damage to life or property, the Company's concern that Foreman Ismail or others could have been left in danger remains valid.

19. I cannot agree, however, that the Grievor was attempting to shift blame to the RTC. At Q and A21, the Grievor is clearly referring to the male foreman: "the way he asked me on the radio threw me off" and not the female RTC.

20. The Grievor clearly took responsibility for his error:

> "Q 25. Mr. Couture what would you do differently in the future regarding OCS clearances?
>
> A 25. Engage slow brain, question more."

21. Clearly, multiple errors were committed which warrant discipline.

22. As always, aggravating and mitigating factors are to be examined, as enunciated in the William Scott matter and followed repeatedly. The Company relies on the serious potential for harm caused by a MTAV. It cites the Bulletin put out only two months before this incident (see Tab 59, Company documents):

> More important, we have seen an increase in the number of Main Track Authority Violations (MTAVs) with 64 in 2023 vs. 60 in 2022 and we have had 7 MTAVs YTD 2024 vs. only 3 MTAVs YTD 2023.
>
> This should be ALARMING to all of us as each MTAV presents a situation where there is an exponential increase in the chance that CN team members could be catastrophically injured or worse. Many of these MTAVs also create hugely increased risk to the general public.

23. It further relies on the arbitral jurisprudence which recognizes the importance of safety violations. These were summarized by Arbitrator Link in **Imperial Tobacco Canada Ltd and BCTGM Local 364** 2001 OLAA 565:

The Labour arbitration jurisprudence confirms that safety violations are among the most serious forms of employee misconduct, with employee negligence resulting in a safety threat like that of the Grievor's being grounds for discipline, including dismissal. This is particularly the case in safety-critical workplaces such as the rail industry, where negligence or failure to comply with safety rules and regulations can have catastrophic consequences. In *Imperial Tobacco Canada Ltd. and BCTGM, Local 364 T (Lambert), Re, [2001] OLAA No. 565 at para. 26, Arbitrator Link provides the following guiding principles regarding discipline for safety violations [Tab 46]:*

> *In cases involving the discipline or dismissal of an employee for a safety related infraction, the arbitral case law establishes a number of guiding principles to judge the appropriateness of the punishment. A non- exhaustive list of the pertinent principles would include the following:*
>
> *1. Safety in the workplace is both a stringent statutory obligation and an important industrial relations concern that involves employers, unions and employees. Given the potential consequences, safety infractions are among the most serious of workplace offences.*
>
> *2. As the industrial relations party with the preeminent control over the workplace, the employer has a legal obligation to provide a safe and secure workplace for its employees. Hand in hand with this obligation is the employer's authority to insist that workers perform their duties in a safe and efficient manner.*
>
> *3. Workplace misconduct arising from deliberate, reckless, or negligent behaviour and which results in a potential safety threat or an actual injury is grounds for significant discipline, up to and including dismissal.*
>
> *4. There does not have to be a physical injury or actual harm to establish the seriousness of the incident.*
>
> *5. The mitigating circumstances that an arbitrator will consider in a safety discipline case are those accepted disciplinary elements as listed in Steel Equipment Co. Ltd. (1964), 14 L.A.C. 356 (Reville) and Wm. Scott & Co. Ltd., [1977] 1 Can. L.R.B.R. 1 (B.C.L.R.B.) […].*

24. It notes that multiple errors were committed by the Grievor, not just one. It argues that he had a previous safety violation and that the LE was punished still more severely with 45 Demerits. It submits that the Grievor has extremely short service.

25. The Union argues that the Grievor was forthright, accepted responsibility and that his record was clear with a single exception which had only warranted a warning.

26. While I appreciate the force of the Union arguments, I cannot find that the disciplinary decision of the Company was unreasonable. The 35 Demerits imposed are less than those imposed on the LE. Multiple errors involving CROR 85 were committed by the Grievor, rather than a single mistake, which he admits. While the errors occurred during a short space of time, the grievor committed multiple errors with respect to his location, rather than recognizing his initial error and advising the RTC immediately. The Union acknowledges that some discipline is appropriate, as the MTAV error was a serious one, albeit inadvertent. Weighing against the grievor is the obligation to maintain situational awareness at all times, fundamental to the role of all operating employees and the basis on which rail traffic is controlled, particularly in “dark territory”, as was the case here (see **CROA 4885** and **CROA 4886**). The short service of the Grievor does not help the Union argument that the discipline should be reduced (see **CROA 2021, CROA 4050**).

27. I do not find **CROA 4050**, cited by the Union, to be applicable here. The Grievor in **CROA 4050** had 31 years of seniority with no discipline. While it is true that he was reinstated, the reinstatement came with a 9 month suspension without pay.

28. In all the circumstances, I cannot find that the Company decision to impose 35 Demerits is unreasonable, and I therefore decline to intervene to reduce the discipline imposed.

Conclusion

29. Accordingly, the grievance is dismissed.

30. I remain seized for any issues of interpretation or application of this Award.

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Concerning

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DISPUTE:

The Company's discharge of Conductor J. Couture on June 3, 2024.

AWARD OF THE ARBITRATOR

Context

1. This matter arose as a result of an investigation concerning the MTAV violation, which is the subject of **CROA 5136**. The JSI is set out in the earlier decision. Here, the Company accessed LVVR audio and video tapes which resulted in the Company imposing 30 Demerits on the Grievor for sleeping/assuming the sleep position while on duty. The Grievor was subsequently terminated for having accumulated more than 60 Demerits.

Hearing

2. The Company called a witness, who played inward facing video tape from the cab of the engine, testified as to the process followed, and was cross-examined.

Testimony of Mr. Perkins, Senior Manager Investigations

3. Mr. Perkins spent 10 years as a Conductor and Locomotive Engineer at CP, before spending 5 years at the Transportation Safety Board, where he was involved with major railway safety accidents, such as Lac Megantic and Plaster Rock. For the last 7 years he has been at CN, where he is involved with major accidents as Senior Manager Investigations.

4. He testified that he is one of four people at CN to have access to LVVR tapes from the cabs of engines. A random selection of approximately 10% of all tapes are

reviewed as well as specific tapes when there is an incident and human performance is suspected.

5. He testified that under s. 17.91(1)(b) of the Railway Safety Act the Company may not examine the LVVR tapes if the TSB decides to investigate, but may do so to determine the cause of the incident if the Board opts not to investigate. On May 3, 2024, he learned that the TSB would not be investigating the MTAV violation. He noted that under ss. 24(1) and (2a), the Company needs to have reason to believe that human performance was involved and contributed to the incident. For example, if there was a rail failure, they would not examine LVVR tapes. He then viewed the tapes to determine if a threat was identified, under s. 30(b) of the Act. He identified a threat of the Grievor sleeping or being in a sleeping position. On May 6, he would have gone to local management to show the video.

6. The witness then played the tape from roughly 12:33 to 13:05.

7. In cross-examination, the witness stated that he had reviewed the Railway Safety Act with the Senior Manager Regulatory Affairs and her department, but had no specific training with respect to the Act.

8. On May 3, he was the only person at the Company to have viewed the LVVR tapes. When he identified a threat, he prepared a report and sent it in an email to the local General Manager and Superintendent for that location.

9. He was asked what information he had about the incident prior to seeing the LVVR. He testified that he had a report of the incident over SAP and knew there was a MTAV for this train. He got an accident description from Ryan O'Connor, the manager of RTCs. He did not know anything at the time about the message from the Track Foreman.

10. He was looking at issues of human performance which might have caused the MTAV. He looked at 30 minutes of LVVR tape, 15 minutes pre and post the incident at 13:05. He noted the Grievor was in a sleeping position at 13:00 so reviewed additional tape for a total of 75 minutes. He noted that he was trying to understand the dynamics in the cab. If that had been possible in the first 15 minutes of watching the tape, he would have stopped there. If not, he would go further.

11. He testified that evidence of assuming the sleeping position would be treated quite differently, had it lasted for only 30 seconds - 1 minute, rather than being on-going.

12. The witness testified that neither the Union nor the Grievor were informed of the video accessing, prior to the Notice to Appear. There is a dispute whether such notice is required under ss. 24 (1), (2a) and 31 of the Act.

Issues

A. Was the Company entitled to access the LVVR tapes in the circumstances?
B. Was the investigation conducted in a timely manner?
C. Was the investigation fair and impartial?
D. Was the Grievor sleeping or assuming the sleep position?
E. Is the discipline imposed reasonable, or should it be reduced when considering aggravating and mitigating factors?
F. Is the Grievor being penalized with double jeopardy?

A. Was the Company entitled to access the LVVR tapes in the circumstances?

Position of Parties

13. The Union submits that the Company was not entitled to access the tapes. Doing so is a gross breach of the general right to privacy. The Company has not demonstrated that they have met the requirements of the Railway Safety Act, either with respect to access or to notice. As such, the Company cannot rely on any evidence gleaned from improper access, under the “fruit from the poisoned tree” doctrine.

14. The Company submits that it was entirely permitted and required to determine what had caused the MTAV. It had established that this was a “human factor” problem, where the two people in the cab were responsible. It was entitled to verify if factors within the cab had caused the safety problem.

15. The Company was not required to notify the Union or the Grievor of accessing the tapes. In any event, both were notified by the Notice to Appear.

Analysis and Decision

16. Section 17.91 (1) (b) of the Railway Safety Act sets out when a Company may access LVVR tapes:

> i. **17.91 (1)** A company may use the information that it records, collects or preserves under subsection 17.31(1) for the purposes of

> a. conducting analyses under section 13, 47 or 74 of the *Railway Safety Management System Regulations, 2015*; and
> b. determining the causes and contributing factors of an accident or incident that the company is required to report under the *Canadian Transportation Accident Investigation and Safety Board Act* to the Canadian Transportation Accident Investigation and Safety Board and that the Board does not investigate.

17. Here it is clear that the Company was seeking to determine the cause of the MTAV, which it was required to and did report to the Board, and that the Board would not be investigating.

18. The Regulations set out more explicit conditions for accessing and using data during Accident and Incident Investigations. At s. 24 (1), the following conditions are set out:

> **24 (1)** A company must not access or use, for the purpose of paragraph 17.91(1)(b) of the Act, voice or video data that was recorded in a controlling locomotive operated by the company unless it has identified that the controlling locomotive was involved in the accident or incident; and has reason to believe that activities in the controlling locomotive caused or contributed to the accident or incident.

19. Here it is clear that the locomotive was identified. Mr. Perkins testified that he believed, based on the MTAV and his discussions with the Chief RTC, that a "human factor" was responsible for the error which caused the MTAV.

20. The standard in s. 24 (1) (b) is not very stringent. The Company must only "ha(ve) reason to believe" that "activities in the controlling locomotive" "caused or contributed" to the incident. Here Mr. Perkins knew that a MTAV had occurred and that multiple errors had occurred in communications with the RTC by the Grievor. For these errors to have occurred and for the Grievor to be mistaken as to the position of his train by some 6 miles, activities in the cab impinging on the performance of the employees needed to be verified. This verification was necessary in order to ascertain the "causes or contributing factors of the incident", as called for by the Act.

21. The Union relies on **CROA 2707**, where Arbitrator Picher noted: "As a general rule, it does not justify resort to random videotape surveillance in the form of an

electronic web, cas(t) like a net, to see what it might catch". I cannot agree that the surveillance here was random, or cast too broadly. Rather, the surveillance tapes were limited to the period immediately before and after a serious safety violation. While I agree with the general principles enunciated in **CROA 2707** and in **Monarch Fine Foods and Teamsters Local 647** (1978) 20 LAC (2d) 419 that employees do not lose their right to privacy, this must be balanced by the Company right and obligation to ascertain causes of accidents, as set out in the Railway Safety Act, if only to prevent future accidents.

22. I therefore find that the Company was entitled to access the LVVR tapes in the circumstances.

23. After the tapes are accessed, there are reporting requirements., as set out at s. 24 (2) of the Regulations:

> a. For the purpose of paragraph 17.91(1)(b) of the Act, the voice and video data that a company may access and use is the data from the controlling locomotive involved in the accident or incident that was recorded
>
> b. during the shift of any operating employee who was present when the accident or incident occurred; and
>
> c. during a shift immediately preceding a shift referred to in paragraph (a) if, prior to accessing or using the data, the company has notified all operating employees who are present on the recording, and any bargaining agents representing those employees, that it intends to use the data.

24. There is a dispute between the Parties whether this section requires the employee and the Union to be notified. The Company argues that it is not required, as it was operating under s. 24 (2) (a), while the Union argues that s. 24 (2)(b) requires such notification.

25. I find that the section deals with access to data in the following circumstances: a) during the shift when the incident occurred or b) during a shift immediately preceding. The requirement to <u>immediately</u> notify is only set out with respect to the second option under s. 24 (2)(b), not with respect to s. 24 (2)(a).

26. I find that there is a more explicit requirement to notify those persons appearing on the tapes under s. 31, under certain conditions:

> a. as soon as possible, notify all identifiable persons present on the recording of the data that the company has identified a threat on that recording;
> b. within 30 days after the notice is provided under paragraph (a), advise any employee the company has deemed responsible for the threat as to whether the data will be used to address the threat;
> c. make the data available to any employee whom the company has deemed responsible for the threat, on request of the employee

27. Here the Company identified a threat, namely the Grievor assuming a sleeping position. It notified the Grievor by a Notice to Appear, and provided both the Grievor and the Union the opportunity to view the LVVR tapes prior to the Grievor testifying at a hearing which took place some 3 weeks after the threat was found. Thus, I find that the Company has met the notice requirements. In the alternative, the Grievor suffered no prejudice, as he and his Union had full notice prior to his testimony.

B. Was the investigation conducted in a timely manner?

Position of Parties

28. The Union argues that the investigation contravened article 82.6 as it was not conducted in a timely manner.
29. The Company denies that the investigation was untimely.

Analysis and Decision

30. Article 82.6 sets out:

> i. "It is understood that the investigation will be held as quickly as possible, and that layover time will be used as far as practicable."

31. Here the incident occurred on April 28, the TSB determined not to investigate on May 3 and the investigation occurred on May 23, 2024, 21 days after the notification from the TSB.

32. Given the time to view the LVVR tapes, prepare a report, meet with management and prepare for the investigation, I cannot find that three weeks represents a delay which is untimely.

33. This argument cannot be sustained.

C. Was the investigation fair and impartial?

Position of Parties

34. The Union takes the position that questions asked by the Investigating Officer showed bias and a pre-conceived conclusion about whether the Grievor had been sleeping or assuming the position of sleep. It points to Questions 13, 15, 25-31, all of which are posed in a biased manner, as for example: "you appear to consistently have your eyes shut". It relies on article 82 of the Collective Agreement and arbitral case law finding that a lack of impartiality is not merely a technical issue, but one which voids the discipline ab initio (see **CROA 1561, CROA 2934, CROA 3952** and **CROA 4663**).

35. The Company argues that the investigation was fair and impartial and that the Grievor was given a full opportunity to present his side of the story. It argues that while the questions may have been quite direct, they do not betray a pre-existing decision by the Investigating Officer. The Company relies on **CROA 4656** and **AH 833** for the proposition that even if there are issues with the investigation, they do not rise to the level of rendering it unfair or partial. There is nothing equivalent to **CROA 2934**, where the Investigating Officer called the Grievor a liar and shouted at him repeatedly.

Analysis and Decision

36. I fully agree that an investigation must be fair and impartial. However, this must be assessed on the basis of an analysis of all the circumstances. As Arbitrator Picher noted in **CROA 2073**:

> As previous awards of this Office have noted (e.g. CROA 1858), disciplinary investigations under the terms of a collective agreement containing provisions such as those appearing in Article 34 are not intended to elevate the investigation process to the formality of a full-blown civil trial or an arbitration. What is contemplated is an informal and expeditious process by which an opportunity is afforded to the employee to know the accusation against him, the identity of his accusers, as well as the content of their evidence or statements, and to be given a fair opportunity to provide rebuttal evidence in his own defense. Those requirements, coupled with the requirement that the investigating officer meet minimal standards of impartiality, are the essential elements of the "fair and impartial hearing" to which the employee is entitled prior to the imposition of discipline. In the instant case, for the reasons related above, I am satisfied that that standard has been met.

37. I share the Union concern about the manner in which some of the questions were framed. However, I do not find that this has made the process so flawed that the discipline must be found void ab initio.

38. The comments of Arbitrator Horning in **CROA 4656** are entirely apposite to the situation here:

> I am frankly given pause by the questions, and the manner in which they were posed. However, in this case, the questions themselves do not represent convincing evidence of a biased investigation which grounds the voiding of the Grievor's discipline ab initio. Nor can I agree that the circumstances, as set out in the cases referred to me by the Union (Union Documents 10, 11 & 12), are sufficiently similar to those in the present case so as to assist in establishing a dismissal of the grievance ab initio. While the questions themselves provide justifiable cause for concern,
> it does not follow that discipline will be void ab initio. As noted in CROA 4590, it is the evidence arising from the interview that will determine whether such a result might flow.
>
> The arbitrator has not been persuaded that discipline will always be void ab initio if all members of a crew are not interviewed following every incident. Rather, it is the evidence arising from the investigation which will determine when this result might follow.
>
> In the present case, irrespective of the manner in which the questions were posed, the data-based facts provided via WiTronix are immutable. They are clearly disclosed in Union Document Tab 5. As importantly, the recorded information and his conduct are confirmed by the Grievor. The evidence on which the Grievor's discipline is based does not arise from the interview. Nor do the questions posed and answers given alter the immutable facts or cast them in a different light. Although arguably biased in nature, the questions posed in the circumstances of this case do not, in and of themselves, ground a finding that the investigation is biased and therefore void ab initio.

39. In this case, as in **CROA 4656** cited above, the most probative evidence are the facts shown in the video. The questions and answers are far less important than if no video evidence had been available.

40. In any event, the Grievor was able to respond to the questions and to maintain his position.

41. Consequently, I do not find that the somewhat problematic questions of the Investigating Officer have rendered the investigation either unfair or partial.

42. I also note that there was some dispute about whether the Union received the tapes in a timely manner, given objections about the signing of confidentiality agreements. The Grievor and his representative were able to review the video prior to his testimony and the Union Officers did view the video prior to the hearing. The Grievor did fully respond during the hearing and Mr. Perkins was properly cross-examined, as noted earlier. I do not find that this issue has made the investigation or this hearing less than fair and impartial.

D. Was the Grievor sleeping or assuming the sleep position and if so, is he subject to discipline?

Position of Parties

43. The Company submits that the video clearly shows that there were lengthy periods in which the Grievor was lying back with his eyes closed. He was clearly completely inattentive to his surroundings or his job duties.

44. The Union argues that the Grievor was merely doing deep breathing exercises in an effort to fend off fatigue.

Analysis and Decision

45. The General Rules of CROR require employees such as the Grievor to be fit and not to be distracted or to assume the sleeping position while performing their duties:

> i.A (x) <u>when reporting for duty, be fit, rested and familiar with their duties and the territory over which they operate</u>;
>
> a. (xi) <u>while on duty, not engage in non-railway activities which may in any way distract their attention from the full performance of their duties. Except as provided for in company policies, sleeping or assuming the position of sleeping is prohibited</u>. The use of personal entertainment devices is prohibited. Printed material not connected with the operation of movements or required in the performance of duty, must not be openly displayed or left in the operating cab of a locomotive or track unit or at any work place location utilized in train, transfer or engine control; and
>
> ii.[…]
>
> iii.C (i) <u>be vigilant to avoid the risk of injury to themselves or others</u>;

46. The GOI 8 Safe Work Procedures notes particularly at s.4.1.7: “It is essential to safety, that employees while working give their undivided attention to the performance of their job. The following actions are prohibited while working: Sleeping”

47. The Grievor testified during his investigation:

    i. “No, my eyes were closed briefly during the deep breathing and my eyes were scanning the horizon for hazards and I was fighting sleep” (Q and A 12);
    ii. “My eyes were not closed completely, no” (Q and A 14);
    iii. Q. 25 “Can you please explain why at certain points in the video footage you appear to consistently have your eyes shut?”
    iv. A25 “To practice deep breathing, re-center and mitigate fatigue. My eyes were not completely shut”.

48. There is no definition of “assuming the sleeping position”. However, it is clear from the LVVR tape from approximately 12:30 to 13:05, that the Grievor spent the majority of this period reclined, with his eyes apparently closed.

49. On approximately 7 occasions during the 35 minutes of observed tape, his eyes would open, he would stretch or look out the window, but then his eyes would almost immediately close again. On 2 occasions, horns blow or the radio is heard, but his eyes appear to remain closed. At 12:42 of the tape, while he was leaning back with his eyes closed, his head rolled to one side. In contrast, at the end of the observed tape, he is upright, using the radio.

50. In my view, there can be little doubt from the LVVR footage that the Grievor had assumed a sleeping position and was clearly inattentive to his functions for much of the 35 minutes captured on the tape.

51. As such, he has clearly infringed CROR Rules and is subject to discipline.

E. Is the discipline imposed reasonable, or should it be reduced when considering aggravating and mitigating factors?

Position of Parties

52. The Union takes the position that the discipline imposed is excessive in the circumstances. It points to multiple cases where discipline as low as 15 demerits was found to be appropriate for sleeping on the job. It notes that the Grievor had an almost totally clean record prior to a one-hour period on April 28, 2024.

53. The Company takes the position that the discipline imposed is entirely reasonable. The Grievor violated key safety regulations by sleeping or assuming the position of sleep on a moving train. He was inattentive to his duties for a lengthy period. His explanation of “deep breathing exercises” rather than sleeping is not credible and reflects a lack of credibility and remorse. The Grievor had very short seniority. The case law supports the imposition of serious discipline including discharge for the violations committed by the Grievor.

Analysis and Decision

54. All decisions must be decided on the facts. The relevance and weight to be given to other decisions will depend on the similarity of the facts to the matter in dispute.

55. Here the video evidence clearly shows that the Grievor assumed a sleeping position for more than 30 minutes, while on duty in a moving train. This situation is distinguishable from an employee who momentarily dozes off or one who is sleeping in a parked vehicle or office.

56. I find that the cases cited by the Union are largely distinguishable, as the facts underlying decisions cited are very different from the facts in the present matter.

57. In **CROA 1853**, Arbitrator Picher reinstated a brakeman who had momentarily dozed off, but did so without compensation and with 40 demerits. He noted: “This was not a deliberate act on the part of the grievor, or a failure to carry out his duties for a lengthy period which jeopardized the safety of his train”. In the present matter, the actions of the Grievor were not momentary, but rather continued in excess of 30 minutes.

58. Many of the cases cited by the Union do not involve sleeping or assuming a sleeping position on a moving train (see **CROA 2847, AH 683** asleep at desk, or on office floor; **CROA 2030**, asleep on a cot in an office; **CROA 3633, CROA 3828, CROA 4237, CROA 4334, AH 676, AH 684** asleep in parked vehicles). The lesser penalties imposed in these cases do not reflect the far more dangerous facts of the present matter.

59. The Company cites **CROA 1685**, a decision of Arbitrator Picher, who upheld the discharge of a short service employee who fell asleep while operating a self-propelled machine for some 15 minutes, resulting in a collision. He held: “It is trite to say that safety must be a primary concern in the movement of rail equipment. In this context sleeping on the job involves an obviously great dimension of peril. The risk to life and property that may result from an employee sleeping at the

controls of moving railway equipment can scarcely be understated". While the Grievor was a conductor, and not the locomotive engineer, he has duties involving the safety of the train, including emergency braking, which require constant vigilance.

60. The Company cites other decisions where substantial discipline was imposed for sleeping on the job, even where the employee was not in a moving vehicle (see **SHP 730**, 25 demerits to a car mechanic; **CROA 4334**, 25 demerits to an intermodal clerk; **AH 684**, 6-month suspension to a maintenance employee who fell asleep in his truck).

61. I accept that the Grievor had a relatively clean record prior to the two incidents, which is a mitigating factor. Against this must be set his low level of seniority and especially the serious nature of the incident, which is highly aggravating.

62. I do not find the decision of the company to impose discipline of 30 demerits unreasonable in the circumstances.

F. Is the Grievor being penalized with double jeopardy?

Position of Parties

63. The Union argues that the assessing of three form 780s-35 demerits, 30 demerits and dismissal constitutes double jeopardy. It argues that at a minimum, disciplining the Grievor 30 demerits for sleeping and then dismissal constitutes two penalties for the same misconduct, which is not permitted under Canadian labour law.

64. The Company argues that there has been no double jeopardy. Firstly, the penalties of 35 and 30 demerits were assessed for two separate incidents, namely a MTAV infraction and a separate sleeping or assuming the sleeping position infraction.

65. Secondly, the Company uses the Brown System of discipline, where employees are automatically terminated when they accumulate in excess of 60 demerits. Here, the Grievor received 30 demerits for sleeping or assuming the sleeping position, resulting in a total of 65 demerits and termination.

Analysis and Decision

66. For the reasons that follow, I do not find that these circumstances amount to double jeopardy against the Grievor.

67. There were clearly two separate incidents resulting in two separate infractions and two separate penalties. The MTAV infraction and the sleeping or assuming the position of sleep infraction are separate infractions. The situation is similar to a operating rule violation which then results in a drug and alcohol test. While the first violation may have led to a further investigation, the two incidents are separate violations. Here, the evidence discloses that the sleeping or assuming the position of sleep violation had ended shortly before the MTAV infraction. Arbitrators have found that separate discipline for separate incidents do not amount to double jeopardy (see **CROA 395**, **CROA 3995**). **CROA 3860**, cited by the Union, I find to be distinguishable, as the incidents were not qualitatively different, but rather found to be "piling on". This is not the case here.

68. The imposition of the penalty of 30 demerits resulted in a total of 65 demerits and discharge. This is not double jeopardy, but rather inherent to the functioning of the Brown system of discipline adopted by the Company (see CN Discipline Policy, Tab 50, Company documents). Pursuant to this system, employees do not lose pay, as they would with a suspension, but dismissal is imposed if the employee accumulates more than 60 demerits. Here, the Grievor would not have been dismissed, had his demerit record not contained 35 previous demerits.

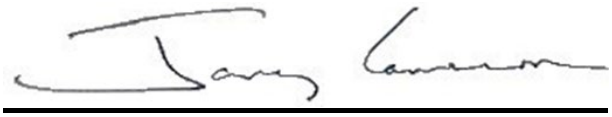
69. Accordingly, I find that the discipline imposed here did not amount to double jeopardy.

Conclusion

70. Given my findings with respect to the two incidents, I cannot find that the decision of the Company to discharge the Grievor based on the accumulation of 65 demerits to be unreasonable. He was in a safety critical position in a moving train, which requires constant vigilance. The Grievor has committed two serious safety related infractions, justifying the discipline imposed, particularly in light of his short service.

71. The grievance is therefore dismissed.

72. I remain seized for any questions of interpretation or application of this Award.



May 8, 2025

JAMES CAMERON

ARBITRATOR